

344 Conn. 503

AUGUST, 2022

517

State v. Freeman

warrant is sufficient ‘prosecution’ to satisfy the statute of limitations only if the warrant is executed with *due diligence*’ (emphasis added); *State v. Crawford*, supra, 202 Conn. 452 (same).

In the present case, the parties do not dispute that the defendant fulfilled his burden of demonstrating his availability for arrest during the statutory period and, therefore, that the burden shifted to the state “to present evidence of its due diligence in executing the warrant.” *State v. Swebilus*, supra, 325 Conn. 803. We emphasize that the requirement of “evidence” to satisfy the state’s burden under *Swebilus* must not be overlooked. “Evidence” in this context means what it normally means, namely, the formal presentation in a judicial proceeding of testimony, documents, or exhibits “to prove or disprove the existence of an alleged fact” *Voris v. Middlesex Mutual Assurance Co.*, 297 Conn. 589, 602, 999 A.2d 741 (2010), quoting Black’s Law Dictionary (9th Ed. 2009) p. 635. “Fairly stated, evidence legally is the means by which alleged matters of fact are properly submitted to the trier of fact for the purpose of proving a fact in issue. On the other hand, ‘proof’ is the result or the effect of such ‘evidence.’ Moreover, [counsel’s] representations [are] not ‘testimony,’ which, in turn, when given under oath or stipulated to, is a species of ‘evidence.’” *Cologne v. Westfarms Associates*, 197 Conn. 141, 153–54, 496 A.2d 476 (1985); see *Federal National Mortgage Assn. v. Buhl*, 186 Conn. App. 743, 751, 201 A.3d 485 (2018) (“[u]nsworn ‘representations of counsel are not, legally speaking, evidence’ [on] which courts can rely”), cert. denied, 331 Conn. 906, 202 A.3d 1022 (2019); *Constantine v. Schneider*, 49 Conn. App. 378, 395, 715 A.2d 772 (1998) (same).

To fulfill its burden of proof regarding the delay in the execution of the warrant, the state was required to produce admissible *evidence* to explain the delay. The

NOTE: These pages (344 Conn. 517 and 518) are in replacement of the same numbered pages that appear in the Connecticut Law Journal of 30 August 2022.

518

AUGUST, 2022

344 Conn. 503

State v. Freeman

unsworn factual representations of counsel, which cannot be tested in the crucible of cross-examination, are not evidence on which the state may rely to fulfill its burden of production and persuasion. Cf. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.9, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (party bearing evidentiary burden of proof “cannot meet its burden merely through . . . argument of counsel”); *Pretzantzin v. Holder*, 736 F.3d 641, 651 (2d Cir. 2013) (government failed to fulfill burden of production because “the arguments of counsel are not evidence . . . and the [g]overnment failed to make any evidentiary proffer” (citation omitted)). This important precept derives from the recognition that “[s]tatements as to facts that have not been proven [or subject to cross-examination] amount to unsworn [and unchecked] testimony” (Internal quotation marks omitted.) *State v. Singh*, 259 Conn. 693, 717, 793 A.2d 226 (2002). Allowing assertions of counsel to serve as evidence, moreover, erases the elemental and crucial distinction between advocate and witness in our adversary system. See Rules of Professional Conduct 3.7 (prohibiting lawyer from testifying as witness except in certain circumstances not at issue in present case).

The question, then, is whether the stipulation of facts, arrest warrant application, and writ of habeas corpus constituted sufficient evidence to establish that the state acted with due diligence in executing the warrant such that the delay in the execution was not unreasonable. Although we have not defined the term “due diligence” in this context, we previously have observed that “[d]ue diligence does not require omniscience. Due diligence means doing everything reasonable, not everything possible.” (Internal quotation marks omitted.) *Skakel v. State*, 295 Conn. 447, 507, 991 A.2d 414 (2010); see *In re Samantha C.*, 268 Conn. 614, 632, 847 A.2d 883 (2004)